Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

By the time this gets to you I will no longer be getting up at 5:20 every morning - once the internal alarm clock gets adjusted.

For the past 23+ years it has been my honor and very real pleasure to associate with you in the role of Director of Utah Prosecution Council. I don't believe there is a better group of people in the world than Utah's Public Attorneys. It has been about as good a job as I could have imagined. Thank you for your support and for your friendship.

Thanks particularly to the hundreds of you who, since 1991, have helped with UPC's training program. Without the volunteered expertise and countless hours of preparation, the training effort could not take place. I'm afraid that as the years passed I too often continued to go to those who were my contemporaries, just because I knew them. I failed to make enough effort to get to know those of you who are now in your careers where I and the other old gray beards were all those years ago. For that I apologize to all concerned. I'm pretty sure my successor will remedy that problem.

Volunteer work has also been vital to the success of the training conferences. Many of you have given of your time and expertise to work on UPC standing and ad hoc committees. The Training Committee is the longest standing and most visible committee, but certainly not the only one. Every time we plan a conference there is an ad hoc committee to do the work. The case management systems would never have come into existence without the work and guidance of several technology and user committees. The prosecutor specific mentoring program that was approved by the Bar was the work of a committee. Every spring, as soon as the legislative session has ended, a number of public attorneys undertake to summarize the many bills passed so the annual legislative update can be prepared. The payment of student loan repayment assistance was guided by a committee. That only scratches the surface of work done by so very many volunteers.

Thanks also to the dozens of dedicated public servants who have served as members of the Prosecution Council since its inception in July of 1990. Without going back through almost 24 years of UPC minutes I couldn't begin to name all of them, but it has been their guidance that has made UPC what it is today.

The UPC staff members with whom it has been my pleasure to work deserve your appreciation and gratitude. They may have answered to me but it was all of you they had in mind as they did their work. I fear I have often failed to express appropriate recognition and appreciation for their professionalism and hard work.

I must also recognize the work done by the really wonderful people in the Attorney General's Administration Division. They are the ones who make

Continued on page 3

In This Issue:

Case Summary Index

Continued from page 1

sure the reimbursement checks are processed and mailed, airline reservations are made and payroll and benefits are paid. And UPC is just something that they do in between taking care of the rest of the AG's Office. Thanks, folks.

My last day on the job will be April 30th. I am looking forward to seeing many of you at the reception my staff and the AG's Criminal Justice Division is preparing for that afternoon. Thanks to them for their preparation on my behalf. Marilyn, I apologize for being grumpy as you have worked to get the reception organized. I really look forward to visiting with everyone. Its just that I hate a big fuss to be made over me.

A number of you have asked what I plan to do with myself. Betta and my first priority is to see more of our grandchildren who live in Vernal and North Dakota. Grandkids are your rewards for raising your kids. Spoiling them is one of life's great pleasures. (I doubt we'll be making another mid-winter trip to North Dakota any time soon, however.)

For years I have wished I had the time to drive the Alaska Highway. I have a brother who lives in Kenai, Alaska so we're going to visit him. Along the way we plan to take lots of detours and see lots of country. Whitehorse, Dawson, Fairbanks! In case you want to see how crazy I am, google the Dempster Highway. (It took a lot of persuading to get Betta to agree to that one.)

After that, the inside of the house needs painting, the hard wood floors need refinishing and there is a bunch of yard work. I expect it will be late fall by the time I run out of currently envisioned projects.

I leave UPC in good hands. As I said, the UPC staff are great people. In Bob Church the Council found a good man who is full of ideas and ambition and who will take UPC to new heights. Most of you are not yet acquainted with Bob. I urge you to get to know him. I know you'll like him.

My best wishes to all of you. The work you do is vital to our state, its communities and to the people who live in them. Right now prosecutors are kind of getting beat up from lots of directions, but without your honesty, ethics and hard work, things would be in really sad shape. Keep up the good work.

Mark

Utah Supreme Court

Mistrial Lead To Double Jeopardy Acquittal

Defendant beat his wife and when she fled to another apartment he chased her and continued to beat her. As the victim hid in a a neighbor's apartment defendant threw a baby gate through a window into the residence and continued pounding on the front door until police arrived. The State charged defendant with aggravated burglary, aggravated assault, burglary, criminal mischief, and reckless endangerment.

The case went to trial in 2010 and prior to jury selection, bailiffs discovered a pocket knife in the pocket of a suit jacket defendant's wife had brought for him to wear in court. Because of this incident, defendant's wife was excluded from the courtroom that day. The following day the judge heard arguments on whether defendant's wife should be allowed in the courtroom, ruled that she could enter the courtroom under strict security, and then took a recess. After the recess, the trial judge announced sua sponte that she was recusing herself and declaring a mistrial because of the incident with the knife. The judge stated that the incidence had affected her and she was worried about ruling in the future. Defendant was retried and convicted. He appealed claiming his second trial violated the Constitutional ban on double jeopardy.

The Utah Supreme Court stated that in a jury trial, jeopardy attaches when a jury has been sworn and empaneled. Declaring a mistrial after jeopardy has attached automatically invokes the double jeopardy clauses of the United States Constitution and the Utah Constitution. Once a mistrial has been declared, a retrial may proceed without offending Utah's constitutional double jeopardy provision only if one of two exceptions applies: (1) the defendant consents to the mistrial or (2) there is "legal necessity" for the mistrial.

The Utah Supreme Court held defendant's retrial violated Utah's double jeopardy clause. The

Continued on page 4

Continued from page 3

supreme court held because jeopardy had attached at the time the trial judge declared a mistrial and defendant objected to the mistrial, only a declaration of legal necessity could preclude the mistrial from operating as an acquittal. The supreme court further held it was the State's responsibility to inform the trial court of the need for a determination that no reasonable alternatives existed in order to establish the legal necessity of a mistrial. *State v. Manatau*, 2014 UT 7

Standards For Civil Stalking Injunction Explained

Robert Baird sought and obtained a stalking injunction against his mother, Gloria. Robert suffered seizures and mental illness. His illnesses were managed well with medications, but he still needed help to manage his money. Robert was trying to gain independence by using the resources available to him to manage his illnesses and live on his own. Robert sought the injunction against his mother alleging she was causing emotional distress and anxiety by calling him, screaming at him, and threatening to seek guardianship as well as threatening to put him in a group home. The trial court held an evidentiary hearing and heard from Robert, Gloria, and other witnesses and determined the stalking injunction was proper. Gloria appealed the decision.

On appeal, Gloria argued (1) the trial court granted the injunction based on its finding that Gloria's conduct was causing Robert emotional distress without finding that her conduct would have caused emotional distress to a reasonable person in Robert's circumstances and (2) it failed to properly interpret the statutory definition of emotional distress.

The Utah Supreme Court held, "The [district] court failed to determine, based on inferences drawn from the evidence, whether Gloria's conduct would cause a reasonable person in Robert's circumstances to suffer emotional distress. We therefore remand this case to the district court for consideration under the appropriate objective standard. The supreme court also held, "a petitioner seeking a civil stalking injunction must show by a preponderance of the evidence that a reasonable person in the petitioner's circumstances would have experienced "significant mental or psychological suffering" as a result of the respondent's alleged course of conduct" and that the "2008 amendment to the Stalking Statute supplants the Lopez decision." *Baird v. Baird*, 2014 UT 08

Utah Court of Appeals

Board Of Pardons Determination Not Resentencing

Alvillar was sentenced to three concurrent terms of zero to five years in prison for his convictions of theft by deception and theft of a financial transaction card. The Board of Pardons (the Board) decided that Alvillar would not be granted parole and should serve the maximum five-year sentence. On appeal, Alvillar claimed that he was resentenced by the Board without a full hearing, the Board denied him due process by relying on documents that were not disclosed to him and the Board improperly relied upon his personal characteristics in reaching its decision.

The Utah Court of Appeals held, "The Board's decision that Alvillar would serve the maximum five-year term was not a resentencing. Instead, it reflected the Board's determination, through the exercise of its statutory authority and discretion, of the time that Alvillar would actually serve on his prison sentence." Because the term set by the Board was within the applicable indeterminate range for his convictions, "that decision, absent unusual circumstances, cannot be arbitrary and capricious."

Continued on page 6

PROSECUTOR PROFILE

Bob Church

UPC DIRECTOR, COL.-Utah Army National Guard

Let me first say "thank you" to the Prosecution Council for allowing me to fill Mark Nash's shoes as the director of the Utah Prosecution Council. I am excited about the opportunities I will have to work with all the prosecutors in the state. I want to continue to provide outstanding training and resources to everyone. I have some ideas of what I'd like to do in the near future but please feel free to let me know what you would like to see come out of our office as well as what we can do to help you in your job as a prosecutor. —Bob

Bob was born in Provo and grew up in Spokane, WA. His mother was Mrs. Washington (1985), and his father received his MBA from Harvard. Bob graduated from BYU in International Relations and Spanish. When told of his plans to become a lawyer, his grandfather asked, "Why do you want to be one of them damned liars?" He is a graduate of California Western School of Law and was commissioned as a JAG officer in the US Navy. While in the Navy he spent 8 months as a SAUSA in the US Attorney's office in Eastern Virginia. After his initial tour of duty, Bob joined the Utah Army National Guard. He is a Colonel and the senior military attorney in the UT Guard. He is a Graduate of the Command General Staff College, United States Army. Bob was deployed to Afghanistan in 2006-07 with the Army. He mentored the Afghan Military Court of Appeals, as well as several judges, prosecutors, defense attorneys and military police. He helped the Afghan military convict a one-star general for assaulting a soldier. This was a first for the Afghan military – convicting a general.

Bob said, "My tour of duty in Afghanistan was the hardest yet most rewarding experience of my career as an attorney and military officer. Being away from my family of course was hard, but I went through some of the most difficult personal and professional challenges I've ever faced. I had to find an inner strength I didn't know I had in order to survive and come through relatively unscathed, but certainly stronger."

When Bob left active duty, he was hired by the City of Orem as a prosecutor and was there until mid-April. One of his most challenging experiences as a prosecutor was trying to explain to a victim of a sexual battery why the jury found the perpetrator not guilty despite the overwhelming evidence to the contrary. And one of his most reward experiences was watching a victim of chronic abuse finally stand up to her abuser, testify and watch him get convicted. Bob says his favorite memories are actually seeing repeat offenders finally "get it" and change their lives.

When asked to share a funny in-court experience, Bob had two: A mom had just excoriated her son on sentencing, landing him 6 months in jail. As he was being led away, she leaned over the railing and in complete sincerity said, "I love you Bobby. I'll come visit you in jail." To which he responded, "Shut up you f'ing b**ch!" She was genuinely surprised by his response. Second, a young lady was handed her criminal information. The judge instructed her to look in the upper left hand corner and verify her information was correct. She looked in the upper left hand corner – of the court room. The judge, while stifling a laugh, had to instruct her to look in the upper left hand corner of the information. (And yes, she was blonde.)

Bob met his wife in a BYU singles ward and says, "We did not like each other at first. I thought she was a boring book worm and she thought I was a rich, stuck-up snob. Took us a year to get past those initial opinions before we went on our first date." They have three sons and one daughter-in-law. Bob loves to ski, hike, mountain bike, work in his yard; basically do anything outside. He and his wife sing in the Orem Chorale.

Quick Facts

Law School: Cal Western

Favorite Food: Mexican

Favorite Book: Where the Red Fern Grows

Favorite TV Show: X-Files

Favorite Quote: "I the Lord am bound when ye do what I say but when ye do not what I say, ye have no promise."

Continued from page 4

The appellate court further held defendant's claim that he was denied due process "does not in itself establish a material issue of fact precluding summary judgment. The Board described the basis for withholding some documents and the fact that summaries of sensitive materials were provided to Alvillar. However, Alvillar did not establish that, given those undisputed facts, he could demonstrate that the procedure for disclosure used by the Board constitutes a denial of procedural due process."
Lastly, the appellate court held, "the Board may consider and weigh any factors that it deems relevant to its determination of whether or not an inmate will be afforded parole, which is "precisely the kind of issue [that is] not subject to judicial review."*Alvillar v. Board of Pardons*, 2014 UT App 61

Convicted Murderer Appealed Convictions On Many Claims
Defendant went to the home of A.S. to settle a drug-related dispute. Defendant brought two men with him. Defendant questioned A.S. and hit her with the butt of his gun. One of the other men burnt her with a cigarette and forced her to take a hit off a crack pipe. During the questioning two friends, D.L. and K.K., arrived. A struggle started during the questioning of K.K. and defendant shot him in the back of the head. Defendant then shot A.S. eight times and D.L. seven times, before fleeing the scene. A.S. and D.L. survived. Defendant was arrested later and a handgun was found in the car he was riding in. Defendant was charged with eight first degree felonies and a misdemeanor.

At trial, the State presented evidence from a firearms-identification expert, David Wakefield, linking the handgun found with defendant at the time of his arrest to the weapon used in the Salt Lake shooting. The State's

evidence also linked the handgun to a shooting incident involving defendant that had occurred on March 12, 2007, in West Valley City (the West Valley shooting)—about six weeks before the Salt Lake shooting. Defendant moved to suppress the testimony of Wakefield, but the trial court denied Defendant's motion to exclude Wakefield's firearm-identification testimony; granted the State's motion to exclude Defendant's designated firearms-identification expert, David Lamagna, from testifying; granted the State's motion to admit evidence of Defendant's role in the West Valley shooting pursuant to rule 404(b) of the Utah Rules of Evidence; and denied Defendant's motion to suppress the eyewitness-identification testimony of both A.S. and D.L.

Defendant was convicted and appealed on six different claims. Defendant claimed that the trial court's decision to allow Wakefield to testify was an abuse of its discretion. The appellate court held, without deciding if the trial court abused its discretion, that any error regarding Wakefield's or Lamagna's testimony was harmless. The appellate court held those decisions were harmless because the State presented so much direct evidence linking the killings to defendant.

Defendant next challenged the trial court's admission of evidence of defendant's involvement in the West Valley shooting, arguing that this "bad acts" evidence unfairly prejudiced his defense. The appellate court affirmed the decision. The trial court held that evidence of the prior shooting helped to "establish that the identity of the person who caused the death of [K.K.] is defendant."
Defendant next argued that the prosecutor engaged in misconduct during his rebuttal to defense counsel's closing argument.

Defendant identifies numerous comments made by the prosecutor that, according to defendant, merited reversal of defendant's

Continued on page 7

Continued from page 6

convictions. The appellate court only considered the prosecutor's remark that the defendant and his attorney did not believe their own defense—based on several out-of-court statements introduced by defendant. The appellate court held this comment was harmless beyond a reasonable doubt.

Defendant also argued the identification of defendant by eyewitnesses was inadmissible under the state due process clause. The appellate court stated that in considering the admissibility of an eyewitness identification, the trial court has the responsibility "to initially screen, under a totality of the circumstances standard, the eyewitness testimony so that it is sufficiently reliable as not to offend a defendant's right to due process. The appellate court held that under the circumstances related in this case, the trial court correctly determined that the identification of A.S. and D.L. were sufficiently reliable for admission at trial. Defendant also challenged the jury instructions and claimed cumulative error. The appellate court rejected each of these claims and affirmed defendant's convictions on all counts. *State v. Clark*, 2014 UT App 56

Directed Verdict Standard Explained

In November 2010, defendant was involved in the robbery of a Springville convenience store . During trial defendant moved for a directed verdict at the close of the State's case. Defendant claimed the evidence did not create a sufficient nexus under the law. The trial court denied defendant's motion and defendant was convicted of aggravated robbery.

The appellate court stated the court "will uphold the trial court's decision if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." The appellate court held, "[In this case] the State submitted believable and sufficient evidence, even if circumstantial, on each element of the crime of aggravated robbery for the jury to conclude beyond a reasonable doubt that defendant participated in the robbery." The conviction was affirmed. *State v. Cristobal*, 2014 UT App 55

Convicted Rapist's Appeals Denied

Defendant started his own church and became the spiritual leader for eighty to ninety people. In this position he often counseled with his followers about who they should have sex with. Defendant counseled with a follower, Harman, about having sex with a fifteen year-old girl that babysat his kids. Defendant counseled him that this was the will of God and that he should do it. Harman had sex with the victim and reported it back to defendant. Defendant himself then had sex with the victim. Defendant was charged with two counts of rape, one for his intercourse with the victim and one through accomplice liability in connection with Harman's rape of the victim. Defendant was convicted on both counts.

Defendant appealed on many different claims. The appellate court affirmed defendant's convictions. The appellate court held, "The admission of evidence that [the victim's sister] believed Victim's story after Defendant asked [the victim's sister] to pose for nude pictures did not prejudice defendant. For the same reason, the trial court did not exceed its discretion in denying a mistrial based on the admission of that evidence." The appellate court also concluded "The trial court did not err by refusing to instruct the jury on mistake of fact because the instructions given to the jury adequately conveyed the applicable law. The trial court acted within its discretion when it

Continued on page 9

Donna Kelly, UPC, and Blake Hills, Salt Lake County Attorney's Office, were recognized and honored by the Utah Coalition Against Sexual Assault (UCASA) for their contributions in the fight against sexual assault.

Donna is the recipient of the National Sexual Violence Resource Center's Visionary Voice Award. Donna has more than 20 years experience prosecuting sexual assault and domestic violence cases. She was collaborated with the Commission on Criminal and Juvenile Justice, Utah Coalition Against Sexual Assault, the Utah Department of Public Safety, and city and county police and prosecution agencies throughout Utah to provide specialized training on sexual assault prosecution. Her outstanding efforts have garnered her national recognition.

Recently Blake made an important clarification regarding the DNA analysis of cases that have been declined. He communicated to the State Crime Lab the importance of linking cases/suspects on multiple sex assault crimes through DNA testing and entering those profiles into CODIS. This clarification has opened the door for the State Crime Lab to process more Sexual Assault Kits/cases.

It is great to see our prosecutors being recognized for their hard work and dedication. Thanks Donna and Blake.

Continued from page 7

permitted the State to amend the information at trial because defendant's substantial rights were not prejudiced by the amendment. Finally, the modified Allen instruction given to the jury in this case was not coercive per se and did not deny defendant a fair and impartial trial." *State v. Dalton*, 2014 UT App 68

Detained Jaywalker Conviction Upheld

Officers were watching an inn where it was reported that drugs were being sold. Defendant was walking outside the inn with another man when they saw a police officer. Defendant changed direction and jaywalked across the street. An officer approached defendant and saw him walk between two cars and drop something white. The officers stopped defendant and recovered what he dropped, which was methamphetamine. Defendant argued on appeal that he was unconstitutionally seized because the officer did not have reasonable suspicion of a drug violation when he detained defendant.

The Utah appellate court held even if reasonable suspicion were lacking as to any drug-related wrongdoing, the facts observed by the officer gave rise to reasonable suspicion that defendant had committed the crime of jaywalking. The brief detention was therefore allowed. Because defendant's Fourth Amendment rights were not violated, a motion to suppress on these grounds would have been unsuccessful, and trial counsel was not ineffective. *State v. Duran*, 2014 UT App 59

Policeman Re-instated After Jail Visit

Fierro was a lay leader in his church and became aware, in his official duties as a police officer, that one of his parishioners was the suspect in a child sex abuse case which was being investigated by the police department. Fierro arranged to visit the parishioner at the jail by calling the jail commander and asking for permission to visit the parishioner who was having a hard time. The jail accommodated his request and gave Fierro special accommodations, such as after-hours access, entry through a door that was typically used only by police officers, and the use of a private visitation room. It was noted that it is normal for clergy to be allowed to use a private visitation room.

Park City Employee Transfer and Discharge Appeal Board (the Board) found that Fierro's testimony showed that he was dishonest in obtaining access to the parishioner because he did not reveal his role as a clergyman. The Board determined that his misuse of his police credentials was sufficient to warrant termination. Fierro challenged the decision of the Board's decision that the Park City Police Department had sufficient grounds for terminating his employment. The Utah Court of Appeals held the Board's findings were not supported by the record and that Fierro was honest about his dual role as a police officer and clergyman, and that he was visiting as a clergyman. *Fierro v. Park City*, 2014 UT App 71

Summary Judgment Granted In Second Appeal Of Important Case

This case revisits *Paget v. Department of Transportation*, 2013 UT App 161. There the appellate court affirmed the trial court's determination that the Pagets' expert testimony established the standard of care that the UDOT allegedly violated was inadmissible. However, the appellate court reversed the trial court's summary judgment ruling in favor of UDOT because it determined that UDOT had failed to prove that its decision not to erect a median barrier was reasonable as a matter of law. After the appellate court issued that decision, UDOT filed a petition for rehearing in which it asserted that

Continued on page 10

Continued from page 9

the Pagets could not establish a prima facie case of negligence without the excluded expert testimony and that UDOT was therefore entitled to judgment as a matter of law.

The appellate court stated that to avoid summary judgment, the Pagets were required to make out a prima facie case of negligence against UDOT, including presenting evidence from which the jury could find that UDOT's decision not to erect a median barrier fell below the applicable standard of care. The appellate court agreed with the trial court that the Pagets could not establish essential elements of their negligence claim without the testimony of their expert and that summary judgment was therefore appropriate. The appellate court affirmed the trial court's summary judgment ruling in favor of UDOT.

Judge Orme dissented stating the deadline for designation of experts in this case is not a product of natural law, constitutional requirement, statutory mandate, the Utah Rules of Civil Procedure, or even a local rule. The deadline was simply a provision contained in the trial court's scheduling order. And as such, it is entirely within the purview of the trial court to adjust or revise it as the trial court may deem appropriate…it is appropriate for that to play out, as it will in the trial court, rather than to be micromanaged by the appellate court.*Paget v. UDOT*, 2014 UT App 62

Criminal Record Of Witness Should Have Been Admitted

Defendant sent a text message to Travis Hawkins offering to sell him a television and a computer. Defendant and another man were involved in a multi-state theft ring with Hawkins. According to Hawkins, defendant and a girl met him to sell him the tv and computer, but instead held him at gunpoint and demanded the money. Then they demanded that Hawkins drive them to an ATM and withdraw money. Defendant was convicted of aggravated kidnapping and aggravated robbery.

Defendant appealed his convictions claiming the trial court's decision to exclude relevant evidence regarding Hawkins's history as a "fence "under rule 403 of the Utah Rules of Evidence was an error, the trial court erred in finding the foundational evidence sufficient to authenticate the text messages used at trial, and that his case should have been dismissed due to the loss or destruction of the ATM video.

The Utah Court of Appeals held the extent of the limitation of evidence regarding Hawkins's criminal history was unreasonable. The appellate court held defendant's defense relied on him convincing the jury he was part of Hawkins's criminal enterprise and so he should have been allowed to show Hawkins's had a history of being a "fence." Furthermore, the appellate court held that because Hawkins affirmatively denied having any problem with stolen goods defendant should have been allowed to rebut the truthfulness of that statement with evidence of his criminal history. The appellate court reversed defendant's conviction and remanded for a new trial. *State v. Otkovic*, 2014 UT App 58

Court's Inquiry Into Waiver Upheld

Waterfield previously appealed to the Utah Court of Appeals and had his case remanded for the limited purpose of definitively resolving objections Waterfield had raised regarding his presentence investigation report (PSI report). Waterfield then appealed claiming that on remand the district court erred in failing to inquire about his expressed dissatisfaction with counsel, finding he had knowingly, intelligently, and voluntarily waived his right to counsel, failing

Continued on page 11

Continued from page 10

to address his objections to the PSI Report and not revisiting his sentence.

The Utah Court of Appeals held that the district court's failure to inquire into Waterfield's expressions of dissatisfaction with counsel was harmless error because the outcome to amending the PSI report would likely have been similar. The appellate court also held the district court's inquiry was sufficient to fulfill the court's duty to determine if Waterfield's waiver was valid. The appellate court also rejected Waterields challenge to the legality of his sentence because he failed to show that the PSI Report was incomplete. The appellate court affirmed the conviction. *State v. Waterfield*, 2014 UT App 67

Bail Bond Statute Interpreted

The operative facts are brief and uncontested. Pursuant to a $2,500 bail bond posted by Statewide Bail Bonding, the jail released a defendant who was awaiting trial on an assault charge. The defendant later missed a scheduled hearing. The district court informed Statewide of that fact and issued a warrant for failure to appear. Over six months later, Statewide delivered the defendant to jail for booking. The next day Statewide filed a motion to exonerate the bond. Nine days later the prosecutor filed a motion to forfeit the bond. The district court granted judgment of forfeiture without a hearing and then, after a hearing, denied Statewide's motion to set that judgment aside. Faced with competing motions, the district court construed the Bail Surety Act to mean that "the bond was forfeit when the six months' time expired and [Statewide] had neither produced [the defendant] to the court or the county sheriff nor filed a motion to extend." Because the defendant "was not arrested within the time limit established by statute," the district court ordered the bond forfeited.

Statewide sought an extraordinary writ reversing the district court's order declaring the bail bond forfeited. The question before the appellate court was, whether the Bail Surety Act mandates automatic forfeiture of a bail bond when a surety does not deliver a defendant within six months of the defendant's nonappearance.

The appellate court stated this fundamental legislative purpose is served by allowing the exoneration of a bail bond even if the surety delivers the defendant after the statutory period has run, so long as judgment has not been entered and the prosecutor has not moved for forfeiture. This reading allows the prosecutor to extend the period for apprehending the absconder by neither seeking forfeiture nor moving the prosecution to judgment. On the other hand, reading the

Continued on page 12

Bob Church, Director, rjchurch@utah.gov
Ed Berkovich, Staff Attorney - TSRP, eberkovich@utah.gov
Donna Kelly, Staff Attorney - SA/DVRP, dkelly@utah.gov
Marilyn Jasperson, Training Coordinator, mjasperson@utah.gov
Ron Weight, IT Director, rweight@utah.gov
Jacob Fordham, Law Clerk, jfordham@utah.gov

Visit the UPC online at
www.upc.utah.gov

Continued from page 11

statute to effect automatic forfeiture after the expiration of the delivery window, without more, would eliminate any incentive for the surety to continue its pursuit of the defendant.

The appellate court held, "Under our interpretation, the six-month period is less a limitations period for the surety than a waiting period for the prosecutor. After a defendant jumps bail, the surety has at least six months to apprehend her, during which time the prosecutor may not seek forfeiture. Thus, in the race to exonerate or forfeit the bond, the surety is given a six-month head start. For the foregoing reasons, we grant the writ. We vacate the district court's order granting forfeiture and direct it to exonerate the bond." *Statewide Bail Bonding v. Hon. Charlene Barlow*, 2014 UT App 54

Tenth Circuit Court of Appeals

Signature Results In Conviction For ID Theft

Defendant was convicted of mail fraud and aggravated identity theft for diverting funds from the National Federation of Federal Employees, a federal union, a national council and local council of the union. Defendant used Union Funds and checks to buy personal items and services, while sending fraudulent bank statements to the Union's officers.

Defendant appealed claiming the district court erred by instructing the jury that a signature is a means of identification for purposes of the aggravated identity theft offense. Defendant argued a signature is not a means of identification because it is not listed in the statute. The U.S. Court of Appeals for the Tenth Circuit held, a signature is a form of "a name," which is included in the statute as a means of identification. The Tenth Circuit agreed with the Ninth Circuit on this issue and held the jury instruction was not erroneous. The Conviction was upheld. *United States v. Porter*, 10th Cir., No. 12-2048, 3/6/14

No Seizure Without Compliance

Police received an anonymous phone call that two men were sitting in a black Ford Focus in the parking lot of Denny's holding a gun. Police arrived and saw only one black Ford Focus in the Denny's parking lot. When the officers were 25 to 30 feet from the car, they could see two black males inside. The officers then approached the car; one crossed in front of the car from the passenger's side over to the driver's side, and one remained on the passenger's side. With weapons raised, the officers caught the car's occupants off guard, shouting "Hands up, hands up, get your hands up." The driver put his hands up immediately. Defendant (the passenger), however, did not. Although he hesitated briefly and appeared momentarily disoriented, defendant quickly began making furtive motions with his right shoulder and arm that officers testified were consistent with trying to either hide or retrieve a weapon. In response, one of the officers began yelling louder and kicking the driver's door to shock defendant into compliance. After initially ignoring repeated commands to put his hands up, defendant eventually complied.

After defendant raised his hands, one of the officers re-holstered his weapon, opened the passenger's door, and ordered defendant to exit the car. Defendant did not immediately comply or respond so the officer pulled him from the car, put him on the ground face-down, and handcuffed him. Another

Continued on page 13

Continued from page 11

officer then took defendant into custody.

Defendant was charged with being a felon in possession of a gun. He moved to suppress the gun as the fruit of an unlawful search and seizure. The district court denied the motion. The U.S. Court of Appeals for the Tenth Circuit held, "We first explain that, by the time Defendant was seized within the meaning of the Fourth Amendment, the officers possessed the requisite reasonable suspicion to justify a Terry stop." The Circuit court quoted the U.S. Supreme Court when explaining that "a police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission." The court also rejected Defendant's argument that the amount of force used by the officers transformed the interaction into a de facto arrest without probable cause. The appellate court held defendant's Fourth Amendment rights were not violated and affirmed the conviction. *United States v. Mosley*, 2014 BL 57722, 10th Cir., No. 13-3101, 3/3/14

Different Calculation Of Actual Loss For Fraud

Defendant raised money to purchase, renovate and manage low-income apartment complexes in Texas. The goal was to sell them for a profit. Defendant raised over $16 million for these investments. However, the ventures had serious cash flow troubles and defendant started falsifying the reports to investors.

Defendant pled guilty to conspiracy to commit mail and wire fraud. Defendant did not agree with the loss calculation made by the government and made motions to the court to change the loss calculation for sentencing purposes. Defendant's motions were denied and the court sentenced him to 168 months in prison and five years supervised release. Defendant appealed challenging the district court's loss calculation.

Defendant appealed arguing the district court erred in calculating loss because there was no fraud in the inducement of the investments. The U.S. Court of Appeals for the Tenth Circuit held the defendant was correct, the loss of value for the investments should have only calculated the loss once the fraud started. The appellate court held the complex calculation should have included: the reasonably foreseeable amount of loss to the value of the securities caused by defendant's fraud, disregarding any loss that occurred before the fraud began, and accounting for the forces that acted on the securities after the fraud ended. The Circuit court found this accounting to be equitable and remanded the case for further discovery and re-sentencing. *United States v. Evans*, 10th Cir., No. 13-1022, 3/11/14

Court Lacked Jurisdiction For Failure Under Collateral Order

Defendants were indicted on 60 counts of wire fraud, mail fraud, and conspiracy to commit wire and mail fraud. Defendants were involved in a scheme to defraud a bank, for additional credit, in the management of their auto-dealership. The auto-dealership sent false documents to the bank to show collateral for the extra credit it was receiving. One of the defendants, Mr. Calhoun, was the manager of the auto-dealership and was under the impression he would not be prosecuted. Mr. Calhoun testified at a grand jury based on the advice of the attorney that was being paid for by the bank (the victim). The government indicted the defendants, including Mr. Calhoun, based on his testimony. Defendants moved to quash the indictment claiming ineffective assistance of counsel and that the indictment violated the defendant's Fifth Amendment right

Continued on page 14

Continued from page 11

to be properly indicted before testifying before a grand jury. A magistrate judge recommended the district court deny the motion to quash and defendant's appealed the district court's denial of the motion to quash.

The U.S. Court of Appeals for the Tenth Circuit held it did not have jurisdiction and dismissed defendant's appeal. The circuit court held it did not have jurisdiction because the Defendants failed to support application of the collateral order doctrine to these appeals. The circuit court held it was "Mindful of the "Supreme Court's increasing reluctance to expand the collateral-order doctrine," particularly in criminal cases [and] we hold that we lack jurisdiction to hear this interlocutory appeal." *United States v. Tucker*, 2014 BL 67193, 10th Cir., No. 13-7047, 3/11/14

Court Can't Modify Restitution Order Under MVRA For Interests of Justice

Defendant concealed from the Transportation Security Agency (TSA) that he was working full-time for the Utah Department of Public Safety (DPS) while also employed full time by TSA. Defendant pled guilty to one count of making false statements to the TSA in violation of 18 U.S.C. §1001. In his plea agreement and at his plea hearing defendant agreed he owed DPS $188, 548.92 in restitution. An order of restitution was mandatory under the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, because his crime was committed by fraud or deceit. The district court ordered restitution of the full amount.

Forty Months after his sentencing, defendant moved the district court to grant him credit against the order of restitution. Defendant claimed he was entitled to credit based on annual, sick, and holiday leave he had earned, which amounted to $68, 647.16. The government argued the district court was not allowed to modify the final order, absent statutory authority. The district court granted the motion and the government appealed.

The U.S. Court of Appeals for the Tenth Circuit held the MVRA only allows a district court to mitigate the impact an order of restitution might have a on a defendant responsible for the full amount of the loss based on defendant's financial resources. The circuit court held the district court could not reduce the amount of restitution defendant owed because the parties calculated it wrong and defendant agreed to it. *United States v. Wyss*, 2014 BL 71686, 10th Cir., No. 13-4005, 3/12/14

Other Circuits/ States

Sex Offender Registry Not 'Custody'

Defendant entered a guilty plea to a charge of unlawful sexual contact in violation of Colorado law. He was sentenced to two years of probation, ordered to complete a sex-offense-specific treatment program, and required to register as a sex offender. Defendant completed probation in 2007 but was still required to register as a sex offender. He filed a habeas petition claiming the registration requirements sufficiently restricted his freedom to meet § 2254's custody requirement.

The U.S. Court of Appeals for the Tenth Circuit stated that Section 2254(a) requires a petitioner to be in custody pursuant to the judgment of a State court . . . in violation of the Constitution or laws or treaties of the United States. The appellate court explained a petitioner must satisfy the custody requirement at the time the habeas petition is filed. Habeas corpus is available for prisoners released on parole or personal recognizance. The Circuit Court held "the future threat of

Continued on page 15

Continued from page 14

incarceration for registrants who fail to comply with the [sex-offender registration] statute[s] is insufficient to satisfy the custody requirement." The circuit court held Mr. Calhoun was not in custody when he filed his § 2254 petition and therefore, the district court was without jurisdiction to consider the merits of the petition. The Circuit Court affirmed the judgment. *Calhoun v. Attorney General of Colorado*,10th Cir., No. 13-1047, 3/18/14

Expert On Improper Confession Excluded

Defendant killed two friends in a drug induced rage. After he had killed them he attempted suicide and was rushed to the hospital by his mom. The next day he called a personal friend, who was a police officer, and informed him of what he had done. Police investigated, found the bodies, and arrested defendant. He waived his Miranda rights and told the police everything he remembered.

At trial, defense counsel tried to admit the testimony of a professor of criminal justice as an expert. The professor was to testify about police induced confessions, which she had studied extensively. The professor did not intend to testify on the defendant's actual situation because she had not spoken with him. The judge excluded the testimony, after a hearing, finding the study was not based on reliable methods. Defendant was convicted of two counts of murder in the first degree.

Defendant appealed claiming the judge abused her discretion because other expert testimony had been admitted based on similar research. The Massachusetts Supreme Judicial Court held, "in light of the limited number of false confession factors present in this case, combined with the lack of evidence before the jury calling into question the veracity of the defendant's statements, the judge may have concluded that the proffered expert testimony was not relevant and would have distracted or confused the jury by giving rise to speculation based on facts and assumptions not in evidence." *Commonwealth v. Hoose, 2014 BL 65984, Mass., No. SJC-10872, 3/11/14*

***Padilla* Violation Allowed *Coram Nobis* Relief**

Defendant participated in an insurance fraud scheme when a corrupt insurance adjustor offered him more money for some actual losses his business had suffered. Defendant was charged with wire fraud and conspiracy to commit wire fraud. Defendant was living in the U.S. as a permanent resident. He desired to stay in the U.S. and espoused concerns about being deported for a conviction. His attorney advised him that a conviction for misprision of felony was not deportable and so defendant, and the court, accepted a plea of misprision of felony. Defendant was sentenced to five years' probation and restitution of $600,000.

Defendant completed his probation and repaid the full amount of restitution. He continued to travel internationally for work. Eventually he was told that he was deportable because of his conviction for a crime of moral turpitude. His new attorney advised him to return to Australia. Defendant then sought *coram nobis* relief.

The U.S. Court of Appeals for the Second Circuit held, "A petitioner seeking *coram nobis* relief "must demonstrate: 1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ." The Circuit Court held that because defendant could show he could have negotiated a different plea agreement which would not

Continued on page 16

Continued from page 15

have resulted in the deportation he established his claim of ineffective assistance of counsel and satisfied the requirements for *coram nobis*. The conviction was vacated. *Kovacs v. United States*, 2014 BL 56772, 2d Cir., No. 13-0209, 3/3/14

Waiver Of Appeal Upheld After Breach Of Plea Agreement

Defendant's pled guilty to conspiracy to commit mail and bank fraud in exchange for dismissal of other charges, a recommendation for a downward adjustment and a sentence at the low end of the applicable guideline range for accepting responsibility. The plea agreement also included the waiver of appeal regarding the sentence. After the plea was accepted and before sentencing the defendants fled. They eluded arrest for twelve years and eventually were brought in for sentencing. At sentencing they were sentenced for their original pleas and for a new conviction of failing to appear for sentencing. The government requested the longest of sentences and the district court imposed above guideline sentences for both defendants. They appealed.

The U.S. Court of Appeals for the Seventh Circuit held, "The defendants breached [the obligation to appear for sentencing] when they fled the district and avoided the punishment for their crimes for twelve years. The defendants' flight constituted a material breach, depriving them of the ability to hold the government to its promise to recommend the low end of the applicable guideline range." The court also held, "[the] government's obligation to recommend a low end of the guideline sentence was excused by the defendants' breach of their obligation to show up for sentencing and not flee the jurisdiction." The sentences were affirmed. *United States v. Hallahan*, 2014 BL 62420, 7th Cir., No. 12-3748, 3/7/14

Summary Judgment Of §1983 Action Upheld

Sandra Fagnan called 911 to report a possible gas leak at her home. As firemen were in the basement, two police officers waited in the living room of the basement. The officers spoke with Monty Fagan, who was living in the basement at that time, about his gun collection. The officer's noted that the barrels of two of the guns were shorter than a permissible length. The officer's then left the home after no leak was discovered, and compared the gun barrels of Fagan to those at the police department armory. The officer's then reported what they found to city officials, who prepared, reviewed and submitted a search warrant. The warrant was approved and the officers seized the two shotguns, a hacksaw, and a rifle. Fagan was arrested and charged with two counts of felony possession of a short-barreled shotgun. The evidence was not suppressed at trial and defendant was acquitted on both counts.

Fagnan brought suit under 42 U.S.C. § 1983 against the city and the officers for violating his Fourth Amendment rights. The U.S. Court of Appeals for the Eighth Circuit held that the officers did not conduct an illegal search because Fagnan invited the officer's in the basement and the guns were in plain view, that the warrant was valid, and that the officer's had probable cause to arrest him after finding the guns. *Fagnan v. City of Lino Lakes*, 2014 BL 63998, 8th Cir., No. 12-4038, 3/10/14

Evidence Of Abuse Of Other Victims Admitted

Defendant and the victim started dating in 1993. Defendant was physically and verbally abusive towards the victim through the entire relationship. The victim told others of defendant's actions. In 1995 the victim met another man

Continued on page 17

Continued from page 16

and they dated secretly for a couple months. In October of 1995 the victim filed a complaint against defendant, reporting death threats and physical abuse. The victim also notified defendant's parole officer and he began the process of revoking his parole. The day after the victim reported the abuse to authorities the victim's father called the police to report defendant was outside the home, pacing back and forth. Defendant was arrested. Proceedings to revoke his parole were started but the victim refused to testify, sending a notarized letter saying everything she had said was false. Ten days after defendant was released from jail, the victim was shot and killed outside her home when arguing with a male. There were no eyewitnesses and no physical evidence other than two 9 millimeter shell casings. Defendant was eventually charged with and convicted of first degree murder.

At trial, evidence of past abuse of past girlfriends was introduced to show that when women tried to leave defendant, he became physically violent. Defendant appealed arguing the introduction of this evidence was completely irrelevant and inflamed the passions of the jury, and even if it was relevant, its probative value was substantially outweighed by its prejudicial effect on the jury.

The Supreme Court of Pennsylvania held, "In order for evidence of other criminal activity to be admissible to establish a common scheme, two conditions must be satisfied: (1) the probative value of the evidence must outweigh its potential for prejudice against the defendant; and (2) "a comparison of the crimes must establish a logical connection between them." The court applied this standard and held the evidence introduced was significant because "[it] proved that Appellant would use deadly force to prevent a woman from leaving him." The court held, "these considerations, coupled with the fact that comprehensive limiting instructions were issued at trial, lead us to conclude that the probative value of the testimony exceeded its prejudicial impact." *Commonwealth v. Arrington*, 2014 BL 55655, Pa., No. 516 CAP, 2/28/14

Limited Options Result In Arrest

Officer Reichert pulled over a Terrance Huff(Huff) and Jon Seaton(Seaton) for what the officer described as swerving across the middle line. The officer asked Huff to provide him with his license, insurance, and registration, which Huff did. The officer then asked Huff to get out of the car because he was having a hard time hearing him. The two of them spoke and the officer said he was letting him go with a warning. That part of the stop took about sixteen minutes. After giving him the warning the officer asked if he could search the car for drugs. Huff replied to the this request that he would just like to go on his way. The officer then said he wanted to walk a drug sniffing dog around the car and Huff responded by saying he was being profiled and asked if he could leave. The officer responded, "not in the car." The officer performed the dog search and then searched the inside of the car but did not find anything. The total time of the search was another 34 minutes after the warning was given. Huff brought a §1983 action against the officer and the City.

The U.S. Court of Appeals for the Seventh Circuit held, the stop turned into an arrest when Huff and Seaton were not allowed to reasonably leave. The government argued they were free to leave, but when Huff asked if they were free to leave the officer said not in the car. The officer also told them if they walked on the highway they would be arrested, because it is illegal. They could have an officer drive them to a gas station but their

Continued on page 18

Continued from page 17

car would be towed and impounded because it is illegal to abandon a car on the highway. The Circuit Court held that under these circumstances no reasonable person would feel free to leave. The court also held that the officer did not have probable cause for the arrest and affirmed the district court's denial of motion to dismiss. *Huff v. Reichert*, 2014 BL 66422, 7th Cir., No. 13-1734, 3/10/14

Smell Of Marijuana Doesn't Create Exigency

Deputy Stanley pulled over Nancy Hille for an expired vehicle registration sticker and found that the expiration date was different than the date on the expired sticker. Because it was late at night Stanley was not able to resolve the date discrepancy and let Hille go. The next day Stanley confirmed that the sticker on Hille's car was stolen, which is a felony. Stanley and another deputy went to Hille's address to arrest her. When they knocked on the door it was opened by James White, who owned the home and was Hille's boyfriend.

The deputies asked to come into the home and White refused to let them enter without a warrant. The deputies blocked the door from being closed, tackled White, and arrested him for obstructing a peace officer. The charge was later dismissed, but White brought a §1983 action against the deputies for false arrest and excessive force. The deputies moved for summary judgment claiming they smelt burning marijuana, which provided exigent circumstances. The motion was denied and the deputies appealed.

The U.S Court of Appeals for the Seventh Circuit held that police who simply smell burning marijuana generally face no exigency and must get a warrant to enter the home. *White v. Stanley*, 2014 BL 66429, 7th Cir., No. 13-2131, 3/11/14

Autopsy Report Not Testimonial

Defendant and Nichole McCorkle, the victim, had been in a relationship since 1999. They had one child together and Nichole had two other children. In 2005, Nichole had to go to the hospital and receive stitches because defendant pistol whipped her. The police investigated and a temporary protection order was granted for Nichole. Defendant was charged with felonious-assault charges but worried about serving time. Defendant tried to influence Nichole's testimony about what had happened the night he pistol whipped her.

Nichole testified truthfully to the grand jury about the incident. Defendant told a friend that he was going to have to kill her. Shortly afterwards, Nichole went to a bar and had a few drinks with Willie Hutchinson. When she arrived home she was supposed to call him. She never called so Hutchinson called her and a man answered. Hutchinson then called a friend of Nichole's and told her what had happened. The friend rushed to Nichole's house to find defendant and Nichole on the porch. The friend told defendant he needed to leave, but he pulled a pistol and told the friend to leave. As the friend was running away she heard three gunshots, she looked back and saw Nichole on the ground with defendant kneeling over her.

Defendant was charged with aggravated murder. At trial a medical examiner, who did not perform the autopsy on Nichole, testified about the autopsy results. The autopsy report was also admitted into evidence. Defendant objected and appealed claiming the medical examiner's testimony violated his Sixth Amendment right to confrontation.

The Supreme Court of Ohio held that the medical examiner's testimony constituted [the Dr.'s]

Continued on page 19

Continued from page 18

original observations and opinions and did not violate the Confrontation Clause because he was available for cross-examination. The supreme court also held that because autopsy reports are not primarily created for prosecutorial purposes. Rather they are created to record the manner of death. The conviction was affirmed. *State v. Maxwell*, Ohio, No. 2007-0755, 3/20/14

Court May Modify Conditions For Supervised Release

Defendant admitted in a plea agreement that he and his co-defendant had been driving a motor home when they offered a ride to a disabled female who was walking on the side of the road. Defendant also admitted that once the victim was in the motor home she was bound and raped by both defendants. At sentencing the district court required defendant to register as a sex offender as a special condition of supervised release.

After defendant had served his prison term and began his term of supervised release, his Probation Officer filed a petition with the district court to modify his conditions of supervised release. The supervisor requested a number of additional special conditions of his supervised release and defendant opposed the motion. The government then filed a motion requesting a sexual deviancy evaluation so that the district court "will be in a better position to evaluate whether [the other] additional conditions of supervised release are necessary." The district court granted the motion for a sexual deviancy evaluation in a sealed order. Defendant appealed claiming that absent a "change in circumstances," the district court lacked jurisdiction to modify the conditions of his supervised release.

The U.S. Court of Appeals for the Ninth Circuit held, "a district court can modify a defendant's conditions of supervised release pursuant to 18 U.S.C. § 3583(e)(2) even absent a showing of changed circumstances." The Circuit Court affirmed the district court's order. *United States v. Bainbridge*, 2014 BL 62284, 9th Cir., No. 13-30017, 3/6/14

Intent To Have Sex Coincided With Crime

Defendant was a soldier stationed at Fort Bliss, Texas. On leave he started a relationship with K.O. in his home town in West Virginia. The two had sex even though K.O. was only fifteen and defendant was twenty-two. When defendant returned to Ft. Bliss he and K.O. spoke on the phone every day. Defendant then returned to home on leave and again had sex with K.O. again.

When defendant returned to Ft. Bliss K.O. made accusations that someone she was living with had sexually assaulted her. Defendant arranged for a friend to transport K.O. to Texas to live with him.

While K.O. and defendant's friend were driving to Texas they were pulled over for a traffic violation. The officer suspected that K.O. might be a runaway and investigated further. The investigation revealed defendant's conduct and he was charged with 18 U.S.C. § 2423(a), transporting a minor with the intent of sexual activity.

Defendant and K.O. never had sex after she was transported to Texas, but defendant was convicted. On appeal defendant claims the evidence against him was not legally sufficient to sustain his conviction because he stated his intention for transporting K.O. was to protect her from the sexual abuse in West Virginia. U.S. Army Court of Criminal Appeals held, "the proper reading of § 2423(a) is that as long as the illegal sexual activity is a purpose of the transportation across state lines, and not merely incidental to the travel, the intent element of § 2423(a) is met." The court affirmed the conviction holding "there was sufficient evidence to find defendant's intent to have sex with K.O. coincided with the actus reus of crossing state

Continued on page 20

Continued from page 19

lines."
United States v. Kearns, C.A.A.F., No. 13-0565, 3/21/14

Testimony On Drug Jargon Not Hearsay

Defendant was involved in a conspiracy to distribute cocaine and marijuana. Law enforcement tapped the telephone calls of all the conspirators. The phone calls were introduced at trial to support testimony of less-than credible witnesses. The calls made heavy use of code words and vernacular and were often difficult to follow. One of the lead investigators took the stand to testify, as a lay witness, about the meanings of the code words and vernacular used in the drug trade. He stated that his knowledge of these words was based on his experience in investigating the drug trade. The government also called a Drug Enforcement Agency (DEA) agent as an expert witness to testify about what was being said in the phone calls. He also stated that he had gained his expertise from investigating the drug trade.

Defendant was convicted and appealed claiming the testimony about the meaning of the phone calls was inadmissible. The U.S. Court of Appeals for the Fifth Circuit held, the district court did not abuse its discretion in admitting the lay witness's testimony because the testimony was based on his direct investigation of the crimes, not his expertise. The court also held the testimony of the expert was proper because the government gave proper notice of his qualifications and his testimony. The court rejected the argument that his expertise was based on impermissible hearsay, violating the Confrontation Clause. The court held that his testimony was not based on hearsay because he had become familiar with the common drug jargon.
United States v. Akins, 2014 BL 83617, 5th Cir., No. 12-40515, 3/25/14

H.B. 411 Update

Beginning May 13, 2014, prosecutors have a new tool to use at sentencing to enforce payment of restitution and other court ordered fines and fees. The courts may apply bail that is posted by the defendant in a case by cash, credit card or debit card, toward accounts receivable in the case. Accounts receivable includes all amounts due to be paid in the case.

The court "may" order the posted bail to be applied, so prosecutors should ask for this at sentencing.

If there is restitution ordered to more than one person or agency, the priority for payment amongst those entities is as follows: 1) victim; 2) Utah Office for Victims of Crime; 3) any other government agency which has provided reimbursement to a victim; 4) reward money; 5) insurance companies; 6) county correctional facility.

This change was made by the passage of House Bill 411, which amends 77-18-1, 77-18-6 and 77-20-4.

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

May 13-15	CJC/DV Conference *For anyone who has a role in DV or Child Abuse Cases*	Zermatt Resort Midway, UT
June 18-20	Utah Prosecutorial Assistants Assn. Annual Conference *Training for para-legals and secretarial staff in prosecutor offices*	Homestead Resort Midway, UT
July 31 - August 1	Utah Municipal Prosecutors Assn. Summer Conference *Training for city prosecutors and others who carry a misdemeanor case load*	Crystal Inn Cedar City, UT
August 18-22	Basic Prosecutor Course *Trial advocacy and substantive legal instruction for new prosecutors*	University Inn Logan, UT
September 10-12	Fall Prosecutors Training Conference *The annual CLE and idea sharing event for all Utah prosecutors*	Courtyard by Marriott St George, UT
October 15-17	Government Civil Practice Conference *Training designed specifically for civil side attorneys from counties and cities*	Zion Park Inn Springdale, UT
November	Advanced Trial Skills Course *For felony prosecutors with 3+ years of prosecution experience*	Location TBA Salt Lake Valley
November 13-14	County/District Attorneys' Executive Seminar *An opportunity for all county/district attorneys to discuss common issues*	Dixie Center St. George, UT

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

NATIONAL CRIMINAL JUSTICE ACADEMY

(NDAA will pay or reimburse all travel, lodging and meal expenses - just like the old NAC)

May 12-16	Trial Advocacy I SUMMARY Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT
June 9-13	Trial Advocacy I SUMMARY Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT
July 7-11	Trial Advocacy I SUMMARY Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT

Calendar

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

May 19-23	childPROOF Summary Application Agenda *Advanced Trial Advocacy for Child Abuse Prosecutors. There will be no attendance fee for this course. Only 30 prosecutors will be selected to attend.*	Washington, DC
June 2-6	OFFICE ADMINISTRATION Agenda Summary Registration *For Chief Prosecutors, First Assistants, Supervisors of Trial Teams and Administrative Professional Staff*	Salem, MA
June 9-18	CAREER PROSECUTOR COURSE Flyer Registration *NDAA's flagship course for those who have committed to prosecution as a career*	San Diego, CA
June 23-27	INVESTIGATION & PROSECUTION OF CHILD PHYSICAL ABUSE & FATALITIES Summary Registration	Baltimore, MD
June 23-27	UNSAFE HAVENS I Summary Agenda Registration *Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation. No registration fee for this course, which will be taught at AOL headquarters campus.*	Dulles, VA
July 14-17	ChildProtect Summary Agenda Application *Trial Advocacy for Civil Child Protection Attorneys. By application only. 30 attys. will be selected to attend.*	Winona, MN
October 6-10	STRATEGIES FOR JUSTICE Summary (Registration link coming) *Advanced Investigation and Prosecution of Child Abuse and Exploitation*	Phoenix, AZ
November 17-21	UNSAFE HAVENS II (application link forthcoming) *Advanced Trial Advocacy for Prosecution of Technology Facilitated Crimes Against Children. The course is by application and only 30 prosecutors will be selected to attend.*	Dulles, VA

*For a course description, click on the "Summary" link after the course title. If an agenda has been posted there will also be an "Agenda" link. Registration for all NDAA courses is now on-line. To register for a course, click on the "Register" link. If there are no links, that information has yet to be posted by NDAA.